PUBLIC BANK BERHAD

v.

NIKSENG DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATUK MOKHTAR SIDIN JCA
[CIVIL SUIT NO: D2-22-1427-91]
25 MAY 1996

CIVIL PROCEDURE: *Striking out - Want of prosecution - Summons for directions taken out more than three years after pleadings closed - Whether defendant obliged to take out summons for directions upon plaintiff's failure to do so - Change of solicitors - Whether reasonable excuse - Whether inordinate delay - Whether defendant prejudiced.*

This was the plaintiff's appeal against the decision of the Senior Assistant Registrar who allowed the application of the defendant to strike out the plaintiff's claim for want of prosecution. According to the defendant, no further pleadings were filed after their amended statement of defence was filed on 5 March 1992 and there was no action from the plaintiff until 25 August 1994 when the solicitors for the plaintiff filed notice of change of solicitors. Thereafter, it was only when the defendant took up summons in chambers to strike out the plaintiff's action for want of prosecution that the plaintiff filed their notice of intention to proceed followed by their summons for directions on 15 August 1995 and 18 September 1995 respectively. The plaintiff gave no explanations for the delay. Instead, the plaintiff claimed that the defendant had contributed to the delay in not taking out the summons for directions earlier when the plaintiff failed to do so. The plaintiff further claimed that there was a change of solicitors by the plaintiff and the case was to be decided on documents.

The issues were whether the defendant ought to have taken out the summons for directions, whether the change of solicitors was a reasonable excuse for the delay, whether the delay was inordinate and whether the defendant was prejudiced.

Held:

[1] It is not in the interest of the defendant to proceed with this action and to initiate the proceedings such as in taking out the summons for directions. It is the plaintiff who initiated the proceedings and they must take all the necessary steps to set the action in motion and not the defendant.

[2] The change of solicitors is not an abridgement of time. The non-action by the previous solicitor appears to be the non-action of the plaintiff and the taking over by the present solicitor is not an excuse and far from being a reasonable excuse.

[3] There were two delays. The first by the former solicitors when nothing was done for a period of two years and five months and the second delay which took place between 25 August 1994 and 18 September 1995 when the plaintiff's solicitor took out the summons for directions. No explanation was given for the delay. Therefore, there is inexcusable delay on the part of the plaintiff.

[4] The amount claimed is over RM6 million which has been hanging over the defendant's head since 1991. Furthermore, there has been no denial by the plaintiff of the defendant's averments that the failure on the part of the plaintiff to release the agreed balance of the loan had caused the defendant's project to suffer, receivers were appointed by the plaintiff despite objections by the defendant and that the relevant documents were missing. Therefore, there is strong evidence to show that the defendant would be prejudiced by the delay. As such the appeal is dismissed and the decision of the Senior Assistant Registrar is hereby affirmed. Costs to the defendant.

[Appeal dismissed with costs]

Case referred to:
Birkett v. James [1977] 2 All ER 801 ***(foll)***

Legislation referred to:
Rules of the High Court, O. 25 r. 1(1)

For the plaintiff - Chua Eng Siong; M/s. Iza Ng Yeoh & Kit
For the defendant - Ranjit Singh (Ramesh Kanapathy with him); M/s. K.K Chong, Chai & Khoo

JUDGMENT

Mokhtar Sidin JCA:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar who had earlier allowed an application by the defendant to strike out the plaintiff's claim for want of prosecution.

It is the defendant's case that there was inordinate delay on the part of the plaintiff in taking out summons for directions which was done some three years and four months after the pleadings were closed. It is clear under O. 25 r. 1(1) that the plaintiff must within one month after pleadings are deemed to be closed take out summons for directions. In this case the defendant had filed their amended statement of defence on 5 March 1992 after which no other pleadings were filed. As such the pleadings are deemed to be closed as on that date. Nothing was done until 25 August 1994 when the solicitor for the plaintiff filed notice of change of solicitors. Even after that nothing was done by the plaintiff until 27 July 1995 when the defendant took up summons in chambers to strike out the plaintiff's action for want of prosecution. Only

after that the plaintiff filed their notice of intention to proceed which was filed on 15 August 1995. Thereafter on in accordance with O. 25 r. 1(1). This was done about two months after the defendant had filed the summons in chambers to strike out the plaintiff's action. It is pertinent to point that from 5 March 1992 until 27 July 1995 the defendant had not heard anything from the plaintiff.

The law on this is very clear that is whether there is inordinate delay and the delay is inexcusable. There are abundant authorities in respect of this and there is no necessity to repeat them. Suffice for me to cite the judgment of Lord Diplock in the case of *Birkett v. James* [1977] 2 All ER 801 at 805 where he said:

> ... I shall refer to as *Allen v. McAlpine,* the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC O. 25 r. 1, of the current White Book. The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party ...

It is clear from the submission that the defendant is relying on the second limb only.

As stated earlier that there was no denial of the delay by the plaintiff. Was there any excuse for such a delay? The only point that was raised by the plaintiff's solicitor was that they took over the matters from the plaintiff's previous solicitor, Messrs. Chooi & Co. That took place on 25 August 1994. As can be seen from the chronology of events there are two delays. The first by the previous solicitors when nothing was done. There was a lapse of two years and five months before the present solicitor took over the matters. Nothing was heard from the plaintiff or their solicitor and no excuse was offered for that. On 25 August 1994 the present solicitor took over the matters of the plaintiff. Is this an excuse for the delay? In my view this is not so for the simple reason the change of solicitors is not an abridgement of time. The non-action by the previous solicitor appears to me to be the non-action of the plaintiff and the taking over by the present solicitors to me is not an excuse and far from being a reason excuse.

The second delay as I can see took place between 25 August 1994 until 18 September 1995 when the plaintiff's solicitor took out the summons for directions. In the meantime the defendant on 27 July 1995 had filed their summons-in-chambers to strike out the plaintiff's action. I do not think I am

wrong to say that it was because of this summons-in-chambers which prompted the plaintiff's solicitor into action, firstly in filing the notice of intention to proceed which was filed on 15 August 1995 and secondly the filing of the summons for directions which took place on 18 September 1995. Again no explanation was given for the delay. I believe the plaintiff could not offer any explanation at all.

For the above reasons I find that there is inexcusable delay on the part of the plaintiff.

The next point I have to consider is whether the defendant had been prejudiced by the delay. The defendant submitted that when there is inordinate delay without excuse there is no necessity to satisfy the Court that the defendant is prejudiced. Even that, in my view the defendant had been prejudiced when the amount claimed is over RM6 million and this has been hanging on the defendant's head since 1991. When the action was filed the defendant was under receivership. It is to be noted that the debenture was given by the defendant sometime in 1982. In April 1986 the plaintiff started to take action to recover the sum after issuing the notice of demand. Only in October 1991 plaintiff commenced the present action. In their statement of defence, the defendant averred that because of the failure on the part of the plaintiff to release the loan of RM2,000,000 which was already agreed by the parties, the defendant's project suffered. Further, the plaintiff appointed the receivers despite objections by the defendant. This dragged on for several years and I could not help feeling that most of the documents which are relevant had been lost. This has been clearly shown in the defendant's affidavit affirmed on 8 August 1995 where it was stated at paras. 14-20 as follows:

> 14. The Bank's failure to pursue the action has given rise to substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the defendant (company).
>
> 15. One of the defences of the company against the Bank's claim is that the Bank disbursed RM4.0 million of the RM6.0 million fixed loan on or around 3 December 1982 to Oriental Bank prior to the completion of legal documentation and in breach of the terms of the loan. The Bank in its reply states that the release of the loan was at the request of the company and for the benefit of the company. In respect of this I wish to state as follows:
>
> (a) This premature release of RM4.0 million was made over twelve (12) years ago;
>
> (b) I remember that the directors of the company, namely My. Goh Poh Seng and Mr. Nik Che Kok had disagreements with officers of the Bank.
>
> (c) the then directors of the company explained to the Bank how this premature disbursement had prejudiced the company and caused unnecessary burdens on the company.

(d) I remember vaguely that it had something to do with some contractors having done work and the Bank refusing to make disbursements from the balance RM2.0 million of the RM6.0 million loan as legal documentations were not complete.

(e) I remember some allegations about the Bank practising double standard and had been unfair to the defendant company;

(f) In any event this events happened over 12 years ago and my memory on this particular matter is somewhat blurred.

16. In February 1989 agents of Encik Ahmad Kamal the receiver and manager appointed by the Bank raided the office of the company at Lot 502, 5th Floor, Wisma Central, Jalan Ampang and removed all the files of the company.

17. In 1990 I was trying to assist the receiver and manager to prepare the statements of affairs of the company. Unfortunately, when I search through the files of the company supplied by the receiver's office I found that a lot of files were missing. At this point of time I am unable to remember exactly which particular files were missing as the files were taken away and kept at the office of M/s. Hanafiah & Raslan & Mohamad.

18. The then directors of the company who were actively involved in the affairs of the company and who had regular meetings and discussions (over telephone and otherwise) with officers of the Bank from 1982 to 1986 were Mr. Nik Che Kok and Mr. Goh Poh Seng. For this I wish to state as follows:

(a) Mr. Nik Che Kok resigned as a Director of the company sometime in 1987 and that time he also disposed off his shares. He has no more personal interests in the company. For the past few years he was living in Europe, either in England or Ireland.

(b) Mr. Goh Poh Seng does not have any more share in the company and is no longer a director of the company. In 1987 or so he met with a motor accident. At that time his health was poor but I could still contact him. Sometime in 1990 or 1991 he had a stroke and he was paralysed. All his friends that I met told me that they have not seen Mr. Goh for a long time and he cannot be contacted.

19. Other than the previous directors of the company there would be a number of other witnesses that the company would like to call as witnesses, like Miss Toh who prepared the initial feasibility and other studies on the project. Unfortunately, files pertaining to these experts are now missing.

20. Important files of the company are also missing after all these years.

It appears to me that there are sufficient grounds to show that the defendant may be prejudiced by the delay. The plaintiff in his affidavit appeared not to deny what had been alleged by the defendant. The plaintiff stated that the defendant should also be blamed in not taking out the summons for directions earlier when the plaintiff failed to do so and thus contributing to the delay.

Secondly, there was a change of solicitors on the part of the plaintiff and thirdly the case is to be decided mostly on documents.

As to the first point, it is not in the interest of the defendant to proceed with this action and to initiate the proceedings such as in taking out the summons for directions. It is the plaintiff who initiated the proceedings and they must take all the necessary steps to set the action in motion and not the defendant.

As to the change of solicitors, as I have said earlier the change of solicitors did not give the plaintiff the necessary abridgement of time. It must be remembered that the action is an action by the plaintiff. Any laches or delay by the plaintiff's solicitor are deemed to be of that of the plaintiff.

As to the case being decided mainly on documents, I am of the opinion this is in the defendant's favour. As can be seen from the affidavit of the defendant, most of the defendant's documents had been seized by the receiver and manager appointed by the plaintiff. It was alleged that when the defendant went to look for the documents they were missing. There is no reply to this in the affidavit of the plaintiff.

In my view there is strong evidence to show that the defendant would be prejudiced by the delay. As such the appeal is hereby dismissed and the decision of the Senior Assistant Registrar is hereby affirmed. Costs to the defendant.

Reported by Cindy Chan